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NO. .....

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In The

Supreme Court of the United States

October Term, 1983

EUGENE KASICK, et al.,

Petitioners,

vs.

JOHN R. BLOCK, Secretary of Agriculture, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

Whether, in promulgating rules for one of the largest agricultural programs of the present administration, the Secretary of Agriculture incorrectly excluded popcorn from the 1983 Payment-In-Kind (PIK) program by continuing to rationalize that popcorn is not corn and to determine present program eligibility based upon historical participation in agricultural programs.

Whether it was clear error for the court of appeals to completely ignore and refuse to follow the opinion of this Court in *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Ins. Co.*, — U.S. — (1983) and instead to apply an undefined "enough justification" standard to test informal administrative rulemaking.

PARTIES BELOW

The petitioners are eighty-eight (88) popcorn farmers and producers who filed for injunctive relief against the respondents, John R. Block, Secretary of the United States Department of Agriculture, Dr. J. Dawson Ahalt, Assistant National Secretary for Economic Development of the United States Department of Agriculture, Everett G. Rank, Jr. Administrator of the Agriculture Stabilization and Conservation Service of the United States Department of Agriculture, Roy T. Cozart, Acting Deputy Assistant Administrator for State and County Operations of the United States Department of Agriculture, and Mickey Stewart, Nebraska State Director of the Agriculture Stabilization and Conservation Service of the United States Department of Agriculture.

The petitioners are Eugene Kasick, K & S Farms, Inc., Donald Oelsigle, Ronald Oelsigle, Robert Boe, M & N Farms, Kenneth Morrison, Beaver Springs, Inc., Marvin Regal, Spear Circle Properties, Bill Weier, Novak Farms, B air Brothers, Dennis Blair, Dan McLain, Stuart Bickan., Bob English, John McFadden, Ray Keogh, Bernard Ross, Howard Einspahr, Robert Nichols, Dwight Nichols, Donald Ita, Scott Plugge, David Lange, Darrold Bremer, Arvin Brutehauser, Delmar Conner, Shelby Conner, Larry David, Fred Grothe, Raymond Keogh, Donald Butterfield, Charles Shane, Paul Dwyer, Bruce Anderson, Arnold Buckey, Steve Foster, Swanson Farms, Inc., Francis Arens, Jr., Francis Arens, Sr., James Arens, Mike Arens, Arens Brothers Farming, Inc., Tedd Adams, Wayne Fry, Dana Sisson, Joe Tagel, Jeff Wright, Eugene Koenig, Kinney, Inc., Philip Kroeker, Johnstown Farms, Inc.,

Sunshine Ranch, Inc., Morrison & Kirk Grain Corp., Ansamada, Inc., Dan Armbruster, Triple I Partners, J.E.S. Farms, Agridel, Inc., Al Penner, Terry Johnson, Gary and Daniel Babra, Duane J. Peetz, Danielski Harvesting & Farming, Clarence Danielski, Phelps Farms, Ray Phelps, Gothenburg Feed Products Company, Orvil E. Schmidt, Kevin Svoboda, Thompson Brothers, Robert and Kenneth Thomason, Boe Kielien, McGowan & O'Neil, Tom McGowen, Trosch Irrigation Company, Dick Trosch, Robert Johnson, Jr., Frank Svoboda, Tilden Fertilizer & Supply, Inc., Vincent F. Morabito, Willis Nelson, Gordon Schmidt, Crop Advisory Service, Richard Schindlar, Jow Schindlar, Circle E Farms, Mark Ecklund, Barneil Ecklund, Belmont AG, Inc., Don Khonon, Gene Khonon, Pro-Circle Storage Company, Stromberger Farms, Inc., B & H Farms, Knievel's, Inc., Spittler, Spittler & Bartak, Robert Bartak, Leo Spittler, Richard Spittler, Goodland, Inc., Lazy Horseshoe Ranch, Inc., American Consolidated Corp., Gaylen Land & Cattle Co., Inc., Tom Teihen, Borchers Farm, Terryberry Farms, Laursen Ranch, Inc., Cannon Tire Company, James Haggard, Gene Smith, Gene Popkes, Marvin Fritz, Oelsligle Brothers, Steven D. Koinzan, Paul Kenney, Jeffery Boe, Norris Franzen, R. Swanson Farms, Inc., Virgil Seda, Robert Johnston, Robert Vandewalle, Greg Hoffman, Mission Farms, William F. Bogeler, Bart Stromberger, Donald Wentz, Tad Weier, Steven Terryberry, Joe Weiss, Lueking Bros., Inc., Imperial Management Company, Thomas J. Brennan, Jr., Cornhusker Popcorn Company, Brad Forkner, Larry Rouse, George Reichstein, Steve Rielly, Bruce McTuistan, Ken Anderson, Greg Bartak, Bob Mason, Gary Bartak, Maynard Sterns, Tom Newman, Mike Brown, Robert Culver, Steve Pfister, K-7

Farms, Inc., Sunnyside Farms, Inc., Sandyland Corporation, Gene Chohon, Don Chohon, Lloyd Johnston, Valley Feed & Seed, Inc., Brown Chemical Co., Rambour Realty Company, George Rambour, III, Tom Newman, Caroll Wenhoff, Jerald Mancuso, Richase Kasik, Pat-R-Jan Dairy, Inc., Hennings Family Farms, Inc., David H. Knust, Robert Olson, Leo Dwyer, Frank Gunning, Dale Funk, Dennis Funk, Grosch Farms, Inc., Wayne Grosch, Dick Grosch and Marvin Sharipar.

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October Term, 1983

EUGENE KASICK, et al.,

Petitioners,

vs.

JOHN R. BLOCK, Secretary of Agriculture, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioners, Eugene Kasick, et al., respectfully pray that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Eighth Circuit on September 26, 1983 (rehearing and rehearing *en banc* denied October 27, 1983), and that the opinion of the court of appeals be reversed.

OPINIONS BELOW

On May 3, 1983, the Honorable C. Arlen Beam, Judge of the United States District Court for the District of Nebraska, orally announced his decision holding that the

Secretary of Agriculture was arbitrary and capricious in his rule-making by allowing other types of corn in, but excluding popcorn from, the payment-in-kind program. (App. 14).[1] An Order implementing the oral decision which allowed Eighty-Eight (88) popcorn farmers in the PIK program was filed on May 18, 1983, by the district court. (App. 16).

The United States Court of Appeals for the Eighth Circuit reversed the decision of the district court in an unpublished opinion filed on September 26, 1983. (App. 1). A petition for rehearing and rehearing *en banc* was denied by the court of appeals on October 27, 1983.

JURISDICTIONAL STATEMENT

Jurisdiction to review the decision of the court of appeals entered on September 26, 1983 (rehearing and rehearing *en banc* denied October 27, 1983) by Writ of Certiorari is conferred upon this Court by 28 U.S.C. § 1254(1).

APPLICABLE REGULATIONS

This case involves the following regulations which are set forth verbatim in the Appendix:

48 Fed. Reg. 1476 (January 12, 1983) (App. 22).
48 Fed. Reg. 9232 (March 4, 1983) (App. 37).

STATEMENT OF THE CASE

The petitioners, eighty-eight popcorn producing farmers, obtained a ruling from the United States District

[1]The designation "App." refers to the appendix to this petition.

Court for the District of Nebraska that the Secretary of Agriculture (Secretary) was arbitrary and capricious in excluding popcorn from the agricultural commodities to be included in the new Payment-In-Kind (PIK) program. (App. 37). This PIK program was a massive effort by the Department of Agriculture to divert acreage from the production of certain crops in order to conserve land and to "adjust the total national acreage of such commodities to achieve desirable production goals. . . ." 48 Fed. Reg. 9232 (March 4, 1983). (App. 38). Despite the importance of this program, less than two months elapsed from the publishing of the interim rule through the deadline for registration. This haste led to an improper consideration of the relevant issues presented by the public to the Secretary and to an unreasoned analysis of the eligibility for the benefits of the program.

The Secretary announced the PIK program in an interim rule published on January 12, 1983. 48 Fed.Reg. 1476. (App. 22). Under the PIK program, farmers who agreed to idle land and implement certain conservation techniques would be paid by the government with commodities equaling eighty percent of the average yield from the two previous years' crops grown on that land. The PIK program was to be a supplement to the 1983 acreage reduction and cash land diversion programs and will be a model for future agricultural efforts. These two earlier programs which supplemented PIK had excluded popcorn without explanation from the definition of corn, 7 C.F.R. Part 713.3(c) (1983). The PIK component continued the prior definitions of eligibility with the following statement:

> 'Corn' means field corn or sterile high-sugar corn. Popcorn, sweet corn and corn varieties grown for

decoration uses are excluded. 7 C.F.R. Part 713.3(c) (1983).

The Secretary unilaterally created this definition and ignored Congress' definition of corn, 7 U.S.C. § 1301(a)(9) and his own department's prior definitions which included popcorn.

To remedy the injustice of the exclusion of popcorn, the petitioners and others through numerous comments on the interim rule advised the Secretary of the error made by his department. The petitioners demonstrated and the district court found that the definition was illogical given the stated purposes of the PIK program and the other corn varieties included in PIK. (App. 13-14). Popcorn was shown to be the same genus and species as field corn yet it was not included. The popcorn growers also complained that the exclusion of popcorn discriminated against popcorn producers as seed corn, yellow waxy corn and white corn, (similar corns in terms of the purposes of PIK), were included in the program while popcorn was not. Most importantly, the purpose of the new PIK program was to reduce excessive grain surpluses which purpose would be circumvented by the non-inclusion of popcorn.

The exclusion of popcorn from prior agricultural programs, in part, contributed to a three hundred million pound surplus of popcorn. This surplus, if not reduced, would force popcorn farmers to plant field corn thereby defeating the intent of the PIK program to reduce surpluses. Further, since popcorn was not included in PIK, field corn farmers in the PIK program could plant popcorn on land not certified to the Department of Agriculture even though "field corn" could not be grown on that land. The inartful drafting of the PIK regulations,

therefore, allowed a loophole to subvert the program's objectives because popcorn is interchangeable with field corn.

After compiling the criticisms and the comments of the petitioners and other to the proposed rule, the Secretary published a final PIK rule on March 4, 1983. 48 Fed.Reg. 9232. (App. 37). This final rule repeated the exclusion of popcorn from agricultural programs with the following explanation:

> A resolution by the Nebraska Popcorn Growers with a statement of support signed by 77 producers requested that popcorn be treated as corn for program purposes. Popcorn has not historically been considered to be corn for the purposes of the feed grain program. Acreage which is devoted to popcorn is not, and never has been, used in determining the acreage base for a farm under the feed grain program. Consequently, it has been determined that this acreage is not eligible for payments in kind nor is the acreage of popcorn charged against the acreage of corn which is permitted to be grown by a producer on the farm under the payment-in-kind program. 48 Fed.Reg. 9234 (March 4, 1983) (App. 44).

The petitioners were outraged with the above statement. Firstly, the explanation was in error as popcorn had historically been included in several agricultural programs. Secondly, how could the Secretary use a historical basis for a brand new program? Lastly, the rationale did not in any way refer to the purposes of the PIK program. Had the Secretary considered the popcorn situation in relation to the purposes of the PIK program, he would have concluded that popcorn should have been included.

One week after the publication of the final rule, the petitioners filed suit based upon the federal question jurisdiction of the United States district courts, 28 U.S.C.

§ 1331, against the Secretary and the other respondents seeking declaratory and injunctive relief to prohibit the Secretary from excluding popcorn from the PIK program. On the day of the filing, March 11, 1983, the government and petitioners' counsel stipulated that a March 11, 1983, deadline for registration would not be imposed against them and also that if the petitioners were successful in the district court that the Secretary would consider the farmers to be in the program. Because the planting season was rapidly approaching, the case proceeded on an expedited basis.

On March 17, 1983, a short hearing was held during which evidence was provisionally received to explain the basis of the Secretary's decision. At this hearing it was established that popcorn is biologically "field corn" and falls within the definition of "corn" found in the Official United States Standards for Grain published by the Department of Agriculture. (App. 52). The evidence revealed a three hundred million pound excess supply of popcorn produced on over two hundred thousand acres of farmland. (App. 13). Interestingly, the government's expert at the hearing revealed that white corn and seed corn were allowed into the program even though seed corn is not a feed grain as are the other included crops and white corn was included only because its exclusion would have been "too controversial". There was no evidence that either seed corn or white corn were in oversupply. (App. 14).

After convening one telephone conference with the parties' counsel, the district court orally issued its findings of fact and conclusions of law. (App. 4). This ruling was announced on May 3, 1983, and was a careful analysis of the PIK program's purposes, origins and components. The district court in its decision observed

that contrary to the Secretary's assertions, popcorn had previously been included in agricultural programs and specifically was included in 1970 and 1971. (App. 9). Due to the lack of support for the Secretary's articulated rationale for failing to include popcorn in PIK, the district court determined that a further examination of the administrative record was required to ascertain whether the Secretary's action could be supported. (App. 6).

This review analyzed the purposes of the PIK program. The district court found these considerations unquestionably to be "... the supply situation as to each commodity, the impart of over supply on the U.S. and world economy, the impact of inclusion and exclusion of a commodity on individual producers and the impact upon related industries. . . ." (App. 12). When these considerations were analyzed in conjunction with the circumstances confronting the popcorn industry, the non-inclusion of popcorn was shown to be error.

The government's expert testified that two hundred thousand acres of popcorn are grown annually and there are over three hundred million pounds of popcorn in excess supply. (App. 12). Popcorn reaches animal feed channels, a situation known by the Secretary. (App. 13). The evidence the district court reviewed further showed that many popcorn growers were near bankruptcy and the industry was in turmoil. In view of these facts, it was unconscionable for the Secretary to make no attempt to research the facts relating to the market conditions of popcorn even though statistics were available from the Statistical Reporting Service of the Department of Agriculture and it would have been easy to obtain additional information.

The administrative record revealed that popcorn was excluded from the PIK program because it had not historically been considered corn "for the purposes of the *feed grain* program," (App. 44) (emphasis added) which was the thrust of the PIK program. (App. 22). This rationale was analyzed in connection with the inclusion in the PIK program of white corn and seed corn. (App. 13-14). The court noted that including these commodities in the program while excluding popcorn was inconsistent with a feed grains program. Seed corn, for example, is not a feed grain. (App. 14). White corn is a food grain (App. 14) which, like popcorn, can be used as a feed grain. (App. 14). Neither of the commodities were in oversupply, thus, when the inclusions of these similar commodities in the PIK program were reviewed in connection with the exclusion of popcorn, and in light of the stated purposes of PIK, the arbitrariness of the Secretary's decision was readily apparent. (App. 14).

Based upon the Secretary's failure to follow the purposes of the PIK program, consider the factual situation with respect to popcorn or offer an adequate explanation of the exclusion, the district court held the Secretary's action to be arbitrary and capricious. (App. 14). The court then ordered the Secretary to promulgate rules to implement the ruling of the court. (App. 15). This portion of the court's order relied upon a stipulation of the parties that the Secretary would consider the popcorn growers in the PIK program if they were successful in the district court.

Relying upon the district court's opinion eighty-eight popcorn farmers set aside and idled up to fifty percent

of their farmland. This was a requirement of the two sister provisions of the PIK program. The land was tilled in accordance with approved conservation techniques and no crops were grown on the land. The farmers expected to receive at the normal harvest time corn payments from the government which equaled eighty percent of the average of the farm yield for the two prior years.

Despite earlier indications that the Secretary would not appeal an adverse ruling, the Secretary appealed the opinion of the district court to the United States Court of Appeals for the Eighth Circuit. The court of appeals also expedited the case and reached its decision reversing the district court the day after oral argument (App. 1, 19). The petitioners sought rehearing and rehearing *en banc* because the cursory opinion of the appellate court contained over twenty factual errors, referred to facts outside the record, cited no authority, applied incorrect standards of review and failed to follow the clear precedent of this Court. Rather than following the established "arbitrary and capricious" test repeatedly announced by this Court, the court of appeals applied undefined "ample justification", "enough justification" and "within the ambit of sound administrative descretion" standards of review. (App. 1-3). Rehearing and rehearing *en banc* were denied on October 27, 1983 (App. 21), no payment-in-kind or other compensation was given to the farmers and this Petition followed.

REASONS WHY THE WRIT SHOULD ISSUE

I.

The Secretary's reliance upon an erroneous history of prior participation in agricultural programs in determining present program eligibility demonstrates an illogical, inconsistent and incorrect approach to the promulgation of informal administrative rulemaking which must be corrected before future programs are implemented.

The 1983 PIK program was a major part of one of the largest and most far reaching of modern agricultural programs. Its provisions and the Secretary's procedures for rule-making will form the cornerstone upon which similar agricultural programs by the Department of Agriculture will be based. The PIK program will also be influential in structuring major new agricultural legislation in the upcoming terms of Congress. Despite the significance of the PIK program, the Secretary virtually ignored in his rulemaking an important industry which should have been included in the program. It also is a clear example of continued use of old programs that do not work in the real market. The assitance of this Court is necessary to compel the Secretary to follow the proper procedures in promulgating rules for programs of national interest and to remedy the injustice which the petitioners have been forced to suffer.

Review is necessary as no published opinion of this Court has reviewed the informal rulemaking process of the present administration of the Department of Agriculture. The Secretary's actions have been allowed to go unchecked and in this case have resulted in devastating

results to the Petitioners. The unbridled authority exercised by the Secretary has resulted in the Secretary legislating eligibility for program participation by making distinctions which are illogical, incorrect and unlawful. The Secretary has overlooked enabling legislation and not applied the correct standards in his informal rulemaking. Such conduct justifies the invocation of the supervisory powers of this Court.

The enabling legislation for the PIK program, the Agricultural Act of 1949, directs the Secretary to establish price supports to producers of any "basic agricultural commodity." 7 U.S.C. §1441, *et seq.* A basic agricultural commodity "shall mean corn, cotton, peanuts, rice, tobacco and wheat respectively." 7 U.S.C. §1428(c). That Act defined "corn" by reference to the Agricultural Adjustment Act of 1938. There "corn shall mean field corn." 7 U.S.C. §1301(a)(9). Despite this congressional definition corn was defined for program purposes as follows:

> 'Corn' means field corn or sterile high-sugar corn. Popcorn, sweet corn and corn varieties grown for decoration uses are excluded. 7 C.F.R. Part 713.3(c) (1983).

No explanation was given by the Secretary for his deviation from the congressional definition of corn. Further, the Secretary's definition was in violation of the definition of corn found in the Department of Agriculture's Official United States Standard for Grain, *Corn*, §26.351 (a) (1978) (App. 52) which provides:

> Corn shall be any grain which consists of 50 percent or more of whole kernels of shelled dent corn and/or shelled flint corn (Zea Mays) and may contain not more than 10.0 percent of other grains for which

> standards have been established under the United States Grain Standards Act.

Popcorn falls within this definition of "corn" as revealed at the hearing in the district court.

The petitioners and others presented the inconsistency of the definition to the Secretary in comments to the interim rule, 48 Fed.Reg. 1476 (January 12, 1983) (App. 22), but the Secretary refused to alter his position. In reply to the comments the Secretary simply stated:

> Popcorn has not historically been considered to be corn for the purposes of the feed grain program. Acreage which is devoted to popcorn is not, and never has been, used in determining the acreage base for a farm under the feed grain program. Consequently, it has been determined that this acreage is not eligible for payments-in-kind nor is the acreage of popcorn charged against the acreage of corn which is permitted to be grown by a producer on the farm under the payment-in-kind program. 48 Fed.Reg. 9234. (App. 44).

With this rationale the Secretary showed his unwillingness to consider the popcorn growers' request on its merits or in terms of the objectives of the PIK program. An unreasoned historical exclusion was deemed sufficient to justify a continued denial of eligibility for agricultural programs.

The inappropriateness of history as a guide is shown by the facts of the instant case. Here, the petitioners demonstrated in the district court that the Secretary's "history" was clearly wrong. Popcorn was permitted in the 1978, 1979 and 1980 Normal Crop Acreage and Set-Aside Acreage Programs, 7 C.F.R. §792.2 (1978-81), and the 1970 and 1971 feed grains programs did not omit pop-

corn. 7 C.F.R. §775.2 (1970-71). Even assuming *arguendo* that history in other programs since 1949 is relevant, the record before the agency reflects that the treatment of popcorn has not always been exclusionary. The 1971-1973 Feed Grain Set-Aside Program Regulations, 7 C.F.R. Part 775.2 (1971-73), and the 1978-1981 Feed Grain, Upland Cotton and Wheat Program Regulations, 7 C.F.R. Part 713.3 (1978-81), do not exclude popcorn by definition.

If the Secretary is allowed to exclude the petitioners from the 1983 PIK program then, according to his logic, the exclusion will become an acceptable basis for refusing admittance into future programs. History should not form the basis for participation in governmental programs. Social and economic progress can not be made if history is allowed to dictate eligibility for the programs of administrative agencies. Especially in a new program such as PIK, an important aspect of a problem can be overlooked if not analyzed in accordance with settled principles of administrative law. The petitioners contend that proper administrative rulemaking requires the Secretary to consider eligibility for programs by an analysis of the purposes and objectives of the program with current facts and situations. To do otherwise would permit a definition adopted in accordance with the objectives of one program to be continued in another unrelated program.

The stated purpose of the PIK program was to divert acreage from the production of certain crops to "adjust the total national acreage of such commodities to achieve desirable production goals. . . ." 48 Fed.Reg. 1476 (March 4, 1983). (App. 22). The need for these programs was due to surpluses created by "record production coupled with a weak worldwide demand for these commodities

[wheat, feed grains, rice and upland cotton] due to the global recession and severe financial problems of some of our major foreign customers. (App. 24-25). The Secretary intended the PIK program to bring " . . . supply in line with demand [to stabilize] the domestic market . . ." Id. at 1477. Given these purposes and aims it is difficult to comprehend why popcorn was not included.

Firstly, the petitioners showed that popcorn is "corn" as defined by statute and the Department of Agriculture. For this reason alone popcorn should have been included in the PIK program. Secondly, popcorn was in excess supply as was "corn". The popcorn industry was burdened with a carry-over crop of over three hundred million pounds. An official of the Department of Agriculture admitted in the district court that more popcorn has been produced than what we have utilized or exported and that that excess popcorn has gone into feed. Thirdly, excluding popcorn in the face of such a surplus would have had the counterproductive effect of motivating popcorn growers to substitute field corn for popcorn in the 1983 growing season. Similarly field corn farmers could plant popcorn on non-corn base acres thus adding to the supply of both field corn and popcorn. What the government gained in reducing surpluses through PIK could be circumvented in part by the popcorn growers adding to the surplus with their decision to plant field corn. Only the district court's ruling which prompted the petitioners to idle their land in accordance with the PIK program saved the Secretary from embarrassment on this latter point.

Faced with the persuasive analysis presented by the petitioners, the district court held the Secretary to be ar-

bitrary and capricious in excluding popcorn from the PIK program. (App. 14). The "historical" exclusion was found by the district court to be inconclusive and the purposes of the program were found to be consistent with the inclusion of popcorn. The arbitrary and capricious holding followed from the faulty logic of the Secretary. Only with reference to facts outside the administrative record and an incorrect, cursory review of the problem did the court of appeals reach a different result.

II.

The court of appeals' hasty and unreasoned opinion ignores established and recent precedents of this Court on the scope of review of informal administrative action and requires reversal so that a dangerous guideline will not be followed in the future by the Secretary.

The appropriate standard of judicial review of an informal administrative rule was presented to the district court. It requires the reviewing court to "hold unlawful and set aside agency action, findings and conclusions found to be—(a) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. §706(a). See *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971). Under the "arbitrary and capricious" standard applicable here, "[a] reviewing court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. . . ." *Bowman Transportation, Inc. v. Arkansas Best Freight System, Inc.*, 419 U.S. 281, 285 (1974), *quoting Citizens to Preserve Overton Park, Inc. v. Volpe, supra.* These relevant factors which

must be analyzed were stated in *Motor Vehicle Mfrs. Ass'n. of the U.S., Inc. v. State Farm Mut. Ins. Co.*, — U.S. —, 103 S.Ct. 2856 (1983):

> Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. — U.S. —, 103 S.Ct. at 2867.

Further,

> "the agency must examine the relevant data and articulate a satisfactory explanation for its action. . . ." *Motor Vehicle Mfrs. Ass'n.*, — U.S. —, 103 S.Ct. at 2866.

The above standards of review are well established yet the court of appeals, citing absolutely no authority for its decision, departed from these settled principles and applied tests it labeled as "ample justification" (App. 2), "enough justification" (App. 3), and "within the ambit of sound administrative discretion" (App. 3). Further, to apply these standards, the court of appeals accepted the factual allegations and *"post hoc* rationalizations" of government counsel. Such conduct is forbidden under *Motor Vehicle Mfrs. Ass'n.*, 103 S.Ct. at 2870, and requires this Court to invoke its supervisory power to correct the errors of the appellate court.

Had the factors enunciated by the Court in *Motor Vehicle Mfrs. Ass'n.* been applied by the court of appeals, the district court's ruling would have been affirmed. The petitioners have shown the definition devised by the Secre-

tary to be contrary to statutory requirements. The petitioners also have shown that the Secretary did not even consider the situation plaguing the popcorn industry. The explanation given by the Secretary was incorrect and contrary to the evidence presented to him. Further, the explanation for excluding popcorn was not phrased in terms of the objectives sought to be gained by the PIK program as required by *Motor Vehicle Mfrs. Ass'n.*, nor was there a "rational connection between the facts found and the choice made." *Burlington Truck Lines v. United States*, 371 U.S. 156 (1962).

The opinion of the court of appeals thus demonstrates that it has ignored or misunderstood the precedent of this Court. Possibly, the court of appeals erred simply by relying on the extra-record assertions in the government's brief. If so, a summary reversal upon granting the petition would be appropriate. In either case, the supervisory power of this Court is needed to correct the injustice the petitioners have suffered. An opinion is also needed to condemn history as an acceptable basis for all administrative rulemaking. Without such an opinion, not only will the popcorn industry be denied access to agricultural programs because popcorn was not allowed into the 1983 PIK program but other commodities, industries and persons not presently permitted in governmental programs could continue to be irrationally excluded from eligibility by the application of history without realistic logic.

———o———

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari to the Court of Appeals for the Eighth Circuit should be granted.

Respectfully Submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 83-1781

EUGENE KASICK, et al.,

Appellees,

vs.

JOHN R. BLOCK, Secretary
of Agriculture, et al.,

Appellants.

Appeal from the United States District Court
for the District of Nebraska

Submitted: September 15, 1983

Filed: September 26, 1983

Before BRIGHT, ARNOLD, and FAGG, Circuit Judges.

BRIGHT, Circuit Judge.

Kasick and other popcorn farmers brought this action challenging the Secretary of Agriculture's decision not to include popcorn in the government's 1983 "Payment-in-Kind" (PIK) program.[1] The district court held the Secretary's decision arbitrary and capricious, and ordered him to allow popcorn farmers to participate in PIK and collateral programs on substantially the same basis as do producers of "field corn."

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[1]The Agricultural Act of 1949, as amended by the Agriculture and Food Act of 1981, authorizes the Secretary of Agriculture to establish price support programs for agricultural commodities. 7 U.S.C. § 1441 *et seq.* The Secretary promulgated the rule creating the PIK program, 7 C.F.R. Part 770, in interim form on January 10, 1983, 48 Fed. Reg. 1476 (January 12, 1983), and in final form on February 28, 1983, 48 Fed. Reg. 9232 (March 4, 1983).

Finding ample justification in the record for the Secretary's decision to exclude popcorn from the PIK program, we reverse the district court.

The Secretary established the PIK program as an emergency measure to reduce the oversupply of a number of the major agricultural export commodities, particularly commodities sold to certain financially-troubled foreign purchasers. Corn, wheat, and rice were among the commodities included in the program; barley and oats, two of the major feed grains, were excluded on the ground that the surplus was not large enough to justify additional attempts to reduce production of those commodities. The Secretary defined "corn," for purposes of PIK eligibility, as "field corn or sterile high-sugar corn." Popcorn, sweet corn, and corn varieties grown for decoration were excluded from eligibility.

In light of the declared aims of the PIK program, the Secretary's decision to exclude popcorn, sweet corn, and ornamental varieties was not arbitrary and capricious. These crops amount to only a tiny fraction of total corn production (typically, 200,000 acres are planted in popcorn, 80,000,000 in field corn); they do not figure significantly in the nation's agricultural exports. The popcorn surplus is a mere 1/650 the size of the field corn surplus (300 million pounds as against 196 billion pounds).

Kasick argues that it was irrational to exclude popcorn because excess popcorn is sold as feed and it would defeat the aim of reducing field corn supplies if a substitute feed corn were not also included in the acreage reduction program. But it is apparent that even if the entire popcorn surplus were sold for feed, it would scarcely af-

fect the aggregate supply of corn available for feed purposes. The Secretary considered requests from popcorn producers that their crop be included in the PIK program—as indeed he considered similar requests from barley and oats farmers—but nonetheless decided that the aims of the program did not warrant the inclusion of those crops. We believe the Secretary had sufficient reason to conclude that the national interest, in light of the global economic crisis, justified government incentives for acreage reductions of field corn and certain other commodities but not of popcorn.

The popcorn farmers also challenged the inclusion in the PIK program of seed corn and white corn, which like popcorn account for only a tiny fraction of total corn production. But the Secretary demonstrates enough justification for their inclusion that we cannot call it arbitrary and capricious. The production of seed corn is directly related to the future production of field corn; reducing seed corn production advances the aim of keeping future field corn crops within acceptable limits. White corn, unlike popcorn, has always been included in federal acreage reduction programs, and the Secretary believed that suddenly withdrawing its eligibility would jeopardize the acceptability of the PIK program among farmers in those regions where white corn is grown.

Having reviewed the record, we cannot say that the Secretary's decision has so little support as to be arbitrary and capricious. Accordingly, we reverse the district court, and hold the Secretary's decision to exclude popcorn from the PIK program to be well within the ambit of his sound administrative discretion.

A true copy.

CV.No.83-0-174

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

EUGENE KASICK, et al.,

Plaintiffs,

vs.

JOHN R. BLOCK, Secretary of the United States Department of Agriculture,

Defendants.

* * *

TRANSCRIPT OF HEARING
taken at 1:30 p.m., May 3, 1983.

* * *

THE COURT: You're Brenda Sandberg.

Our regular court reporter, Mrs. Casper, is on a day or two's well earned vacation.

Gentlemen, as you, I think, both are aware, I think we've discussed it at our earlier hearing, March and April we've been operating on a multiple vior dire set up, wherein, we had scheduled almost solidly through the months of March and April civil jury cases.

Because of that situation, we have had a several days, perhaps, six to ten-day criminal case, which has been scheduled to begin tomorrow.

I kept thinking as the month progressed that the attorneys involved in some of these civil cases would get together and settle the case, so that I'd have an opportunity to sit down and to draft an order based upon my

analysis of the record and my conclusions of law and my decision.

Every case it seems has gone the full length, and some of them have taken an extra day or so, and so the time hasn't been available to do that.

And since, as we discussed at the time of the hearing on March 17 of 1983, the planting season is rapidly approaching, notwithstanding the fact that it's been a little colder than usual, and I guess the farming hasn't progressed. I heard this morning that there was 5 percent of the acres planted as opposed to an average of 12 to 14 percent at this time of the year. So hopefully we're still timely.

So I've opted to announce from the bench some findings of fact and some conclusions of law in our decision, and to tell you at the outset that I intend to — to draft a memorandum decision in this matter, and tell you further that there may be further findings of fact, conclusions, and other things, as I will discuss in a moment, at that time.

But in the interest of time and in the interests of the concerns of the parties, both Plaintiff and Defendant, I have chosen to follow this procedure for the reasons that I have outlined.

So we have before the Court, upon the Plaintiff's request for a preliminary injunction a request for that injunction and a stipulation by the parties, as I review the record, for summary judgment by the parties. Therefore, we have before the Court the issues of declaratory relief and injunction presented as have indicated by way of motion for summary judgment, cross motions as a matter of fact.

At the outset let me indicate that I believe the Plaintiffs have established that they have standing to bring this action. The Nebraska Popcorn Association is referred to in pleadings. And I find that they should be bound by this decision that I'm going to announce unless either party makes a showing within seven days as to why they shouldn't be bound by the findings of fact, conclusions of law, and the decision that I make here today and announce — that I announce here today.

I've reviewed the administrative record concerning the promulation of the final rule by the United States Department of Agricultural. Let me say that times here and after I refer to the United States department of agriculture as simply the USDA.

For the special program of Payment in Kind, for acreage diversion for 1983 crops of wheat, corn, grain, sorghum, upland cotton and rice, and I would like to also say that I may here and after from time to time refer to this program as the PIK Program.

At the Court's request, the USDA has supplemented the administrative record with a submission of documents and responses to some interrogatories. And these responses and the submitted documents were received by the Court on April 26, 1983. So as you counsel can see, we have only very recently received all of the supplementation to the administrative record.

Now, the Court has also considered as supplementation by the USDA the testimony of Mr. Grant B. Buntrock, who is an official of the USDA. And this testimony was given, as you recall, at a hearing on March 17 of 1983. And it was requested at that time by the USDA and the

Defendants that I consider Mr. Buntrock's testimony as supplementation to the administrative record concerning the promulgation of the final rule.

And I think it was clear from Mr. Buntrock's testimony that he was one of the USDA officials who was intimately involved in the promulgation of the rule. I believe his name even appears in the Federal Record—Federal Register, I should say, as the person to whom responses to the published interium rule should be sent.

Now, the Court also considered, but in a very limited way, the testimony of Walton C. Galinat, also given at the hearing on March 17 of 1983. The only part of the Galinat testimony considered was his testimony with regard to the definition of the term field corn. This testimony was deemed to be pertinent to an analysis of the meaning of a rather ambiguous term, and that is found by this court to be necessary evidence outside the administrative record, examined solely for the purpose indicated.

I did not consider except on the issues of standing, the other testimony that was presented.

So the following are findings of fact in the conclusions of law which findings and conclusions, as earlier indicated, will be reduced to a written memorandum as soon as possible, which memorandum, may and probably will, as I've indicated, include additional findings and conclusions and citations to statute regulations and perhaps applicable case law.

Now, the parties both have spent a good deal of time discussing with the court one way or another the definitions, and the definitions to be applied, and the definitions

of corn, what is corn or what is field corn. And I will give you my views of the pertinency of all of that shortly.

But I'd like to just review with you, and if you have carefully followed the supplementation of the record made by the USDA, you'll find that as part of field grain programs and the regulations pertaining thereto, since at least 1961, there have been definitions of corn or in some instances, corn acreage.

And just by way of background, and I'll attempt to move through this as rapidly as I can, in 1961, there appears a definition of corn acreage which says any acreage planted to field corn other than close sown corn used for pasture or green manure, popcorn or sweet corn, irrespective of use, and corn on a wildlife farm consisting solely of Federal or State-owned land, not harvested but left on the land for wildlife feed.

Then in 1964, '65 period—I believe this again refers to corn acreage—and it says, it does not include close sown corn used for pasture or green manure, sweet corn harvested primarily for market even though the forage is used for silage, popcorn irrespective of use, and corn not harvested but left on the land for wildlife feed on a farm consisting solely of Federal or State-owned land.

Then in 1970, there were the regulations—contained two definitions, although they were quite similar, the—says for 1959 and 1960. And I didn't dig into the reason why in the 1970 regulations they dealt specifically with 1959 and 1960. But apparently it dealt with some historical matters there.

Any acreage planted to field corn for harvest and any acreage of sweet corn harvested primarily for silage but

does not include a number of things and some of them I have mentioned in the earlier definitions, but it includes popcorn irrespective of use.

Then in that same regulation, it says for the current year it defines corn acreage as any acreage planted to field corn and any acreage of other corn, including sweet corn, popcorn and crosses pastured or harvested—excuse me—popcorn and crosses pastured or harvested primarily for livestock or poultry feed excluding several things. But the exclusions deal with sweet corn or popcorn harvested primarily for human consumption, even though the forage is pastured or harvested.

So you will note in that instance, that in 1970, depending upon the use of the crop, popcorn was either corn acreage or it wasn't corn acreage.

Then in '71, corn acreage means any acreage planted to field corn or sterile high-sugar corn excluding several things, but—well, I'll read them.

It says excluding any acreage of corn approved as a conservation use in Part 792 of this chapter, as amended;

Any acreage of corn destroyed by any means or used for other than grain or silage not later than the disposition date;

And three, any acreage of corn destroyed by natural causes after the disposition date if the operator requests reclarification in writing.

So there again, there is not an exclusive—an exclusion, I should say, of popcorn in that particular definition. And presumably, if you examine the earlier definition that specifically excludes it, I suppose it is arguable that it is included as corn acreage.

Then from 1978 to 1981, the definition said corn means field corn or sterile high-sugar corn. And I believe that the evidence showed at the hearing, apparently, that the USDA interpreted the words field corn not to include popcorn because I believe that one of the witnesses, Mr. Morabito, indicated that he had tried to sign up some corn and the same definition was used in 1982. And as nearly as I can tell from the record, the USDA interpreted the term field corn as to be excluding popcorn.

Then on January 14 of 1983, two days after the interim rule in question was published, the rule which, I believe, was 713.3 in the Code of Federal Regulations, I believe—it escapes me right this moment, the other part of this citation, but nonetheless it's in record as one of the exhibits in the supplemental submission by the USDA. Corn means field corn or sterile high-sugar corn. And then there's an additional sentence that says popcorn, sweet corn and corn varieties grown for decoration uses are excluded.

So I mention these for the purpose only of showing that from the record as I view it, popcorn has historically been included in farm programs on only a—what I would term a very sporadic basis. And more recently has been mostly not included on the basis of interpretations by the USDA of the term field corn or as you will note from the January 14, 1983 regulation, and some of the earlier ones, upon specific exclusions incorporated in the regulations.

Now, a review of this language of the definitions as a means of ascertaining, if possible, the term as it is published in the regulation is at best inconclusive. But it is apparent that in common usage and as used on occasion by the USDA, it may include popcorn.

But the January 14, 1983, definition, which excludes popcorn, which was promulgated by the USDA and which deals specifically with the PIK Program, does not, in my view, in and of itself, appear to be unreasonable or unsupportable as a definition on a historical basis.

However, as I said at the outset, it seems to me that the concern of the parties about definitions and the meaning of the word corn and field corn are not wholly controlling. And it seems to me that whether it is appropriate to exclude popcorn by whatever approach is used, requires a further examination of the administrative record and the supplementation to the administrative record which the Court has sought and received.

I say that in my view the appropriate standard for reviewing regulations which are promulgated pursuant to the notice and comment procedures of the administrative procedures act, that is, 5 U. S. Code Section 553 (C), which I believe is the—which I believe are the provisions of law which were used with the PIK Program, is set out in *Independent Meat Packers Association v. Butz,* 526 Federal Second, 228—this is page 228—which was so decided by the 8th Circuit in 1975.

That case says that the appropriate standard of review is that specified by the five U. S. Code Section 706, parenthesis, two, parenthesis, capital A, which authorizes a reviewing court to set aside agency action found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. And refers to cases at page 238. And I've omitted the citations. I'll not repeat them here.

Under the arbitrary—the Court went on to say that under the arbitrary and capricious standard of reviewing, the reviewing court is to engage into a substantial inquiry into the facts, but is not empowered to substitute its judgment for that of the expert agency. The Court is to consider only whether the disputed regulations were based on consideration of relevant factors or whether there was a clear error of judgment. And the case in support of that citing *Citizens to Preserve Overton Park, Inc., versus Volpe,* 401 U. S. 402, at page 416 in 1971 case.

Now, the record discloses that the purpose of the PIK Program is to reduce surplus agricultural commodities. The major considerations in development of the program by the USDA include the supply situation as to each commodity, the impact of over supply on the U.S. and world economy, the impact of inclusion and exclusion of a commodity on individual producers and the impact upon related industries such as livestock feeders, feed, seed and fertilizer businesses and others, other businesses and individuals who function in relation to the growth of grain and it's marketing in this country and perhaps abroad.

Now, the record also shows that approximately — I believe this was Mr. Buntline's (phonetic)—Buntrock's testimony, that approximately 200,000 acres of popcorn is grown annually in the United States. And the record further shows that there is currently a significant oversupply of the commodity.

And I conclude that although a surplus of popcorn does not have as significant — significant an impact upon the economy of the United States as the oversupply of what was called dent corn at the hearing, I think it would

be inappropriate to consider the impact of a commodity dealing with 200,000 acres of agricultural land as insignificant.

And although popcorn is grown primarily for human consumption, in periods of excess production, such as we have now, apparently, the excess popcorn is diverted into animal feed channels.

And in that regard, I direct your attention specifically to page 75 of the record in Mr. Buntrock's testimony wherein he said, of course, we are aware—and I'm quoting—of course, we are aware that there is more popcorn available. More popcorn has been produced than what we have utilized or exported. And that excess popcorn has gone into feed. Now, I construe that testimony to mean livestock feed. We do — we are aware of that so to that extent, yes, those things were considered to that extent. That's the end of the quote.

Now, barley and oats, which are two acknowledged feed grains, were not included in the PIK Program. But as stated in the final rule which was promulgated, the USDA specifically observed that these two feed grains were not in severe oversupply and that it was evident that the other programs, and I believe it referred to the other two programs, the paid diversion and the other program that was involved, were going to be sufficient to control whatever excesses of those two crops might be forecast.

Now, further, seed corn, which is usually not used for livestock feed and if treated chemically, I believe, is never used for livestock feed because of the nature of the chemicals that are applied, and for which there ap-

pears no evidence in the record of an oversupply, is included within the PIK Program. Although I do recognize that perhaps with the PIK Program, there may be some oversupply.

But I also take notice of the fact that seed corn usually is such that it may be carried over at least for a reasonable period from year to year without an appreciable decline in its viability as seed. Although, I recognize that if treated chemically, that does shorten its life span in that regard.

Now, white corn, which like popcorn is also grown primarily for human consumption and which also like popcorn, finds its way into livestock feed channels when unusual supply and demand factors are present, is also included within the PIK Program.

Okay. Therefore, notwithstanding the historical exclusion of popcorn from feed grain programs, at least recently, when the purposes of the PIK Program are considered as stated in the record and suplementation of the record, in conjunction with other commodities, such as oats, barley, seed corn, and white corn, which are either included or excluded as earlier indicated, the Court finds and declares that under the record before the Court, the Secretary of Agricultural was arbitrary and capricious in excluding popcorn while including white corn and seed corn in the PIK Program.

It is further found and declared, however, that because of the lateness in time insofar as the planting season is concerned, it would be unfair to include, on an all encompassing basis, all popcorn acreage in the PIK Program.

It is therefore ordered as follows:

One, farmers who can establish the production of popcorn acreage in 1982, or in both 1981 and 1982, may at each farmer's option, include such acreage in their corn base for the purposes of participating in the 1983 acreage reduction, Paid land diversion and Payment in Kind programs. However, each such farmer must participate in all three programs as required by 7 Code of Federal Regulations part 770 and include the popcorn acreage in participation computations as to all three programs. Each such farmer may elect not to include popcorn acreage in any computations concerning the three programs and proceed to participate or not participate as though this order were not entered.

And the reason that I make that provision is that as Mr. Buntrock pointed out, there may be persons who, because of information about the unavailability of the PIK Program for popcorn, may have entered into contracts which contracts might not be fulfillable with the acreage that might be available if I order that all popcorn be included. And generally for those reasons that he outlined.

Two, the USDA shall promulgate within ten days rules to be used to establish 1981 and/or 1982 popcorn acreage and may require certificates from growers and/or processors promulgated under the penalties of percentage or through the use of any other available means or devices to determine fair and accurate popcorn acreages for the purposes of these programs.

And three, that because of the administrative complexities of the three farm programs involved, and be-

cause we have not had extensive hearing and briefing and argument as to the various possibilities that may be required or may arise because of this ruling, the parties may and are urged to apply to the Court for additional rulings necessary to implement the foregoing orders with the least impact upon the producers who are affected by this order and the USDA.

That completes my findings conclusions and order in this matter.

Anything further from the Plaintiffs?

MR. DAUB: Nothing, Your Honor.

THE COURT: From the Defendants?

MR. LAHNERS: No, sir.

THE COURT: All right. We'll be in recess.

(Whereupon, the hearing was concluded at the hour of 2:10 p.m.)

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CV 83-0-174

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

EUGENE KASICK, et al.,

Plaintiffs,

vs.

JOHN R. BLOCK, SECRETARY OF AGRICULTURE, et al.,

Defendants.

ORDER

(Filed May 18, 1983)

This matter was previously before the Court upon the parties' cross motions for summary judgment, and is now before the Court upon the motion (filing 14) of defendant John R. Block, Secretary of Agriculture, for reconsideration of this Court's order of May 3, 1983, or, in the alternative, for a stay pending appeal.

In accordance with the findings of fact and conclusions of law read into the record on May 3, 1983, and in accordance with the telephonic conferences between the Court and the parties held on May 11, 1983, and on May 13, 1983,

IT IS ORDERED:

1. That plaintiff shall submit, on or before May 17, 1983, an amended complaint, including as named plaintiffs all producers of popcorn who are members of the Nebraska Popcorn Growers Association and who affirmatively seek relief and are to be bound by this order. The Association itself shall not be named as a party to this action.

2. That producers shall not be entitled to participate in the "whole base bid" portion of the Payment in Kind Program.

3. That producers who can establish the production of popcorn acreage in 1981, or the average of 1980 and 1981, may, at the producer's option, include such acreage in their corn base for the purpose of participation in the remaining portion of the Payment in Kind Program.

References to 1982 production are hereby stricken from the Court's previous order of May 3, 1983.

4. That since plaintiffs have not challenged the "acreage reduction" or "cash land diversion" programs, and since no evidence was adduced at the hearing with regard to the rationality of excluding popcorn from these programs, the plaintiffs shall not be required nor permitted by reason of this order to participate in either the "acreage reduction" or "cash land diversion" programs. The relief ordered herein is limited to permitting plaintiffs, at each plaintiff's option, to participate on the basis of established popcorn acreage in the Payment in Kind Program.

5. That the Secretary shall, on or before Friday, May 13, 1983, promulgate rules in accordance with the rules set out in Footnote 2, page 11, of his motion for reconsideration, or in the alternative, for stay pending appeal (filing 14). Notice of said rules shall be given by mailing a copy to plaintiffs named in the original complaint, and to counsel for plaintiffs for and on behalf of all additional parties plaintiff named in the amended complaint.

DATED this 18th day of May, 1983.

BY THE COURT:

/s/ C. ARLEN BEAM
UNITED STATES DISTRICT JUDGE

No. 83-1781-NE

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term, 1982

EUGENE KASICK, et al,

Appellees,

vs.

JOHN R. BLOCK, etc., et al,

Appellants.

(Filed September 29, 1983

Appeal from the United States District Court for the District Court for the District of Nebraska.

This appeal from the United States District Court was submitted on the record of the said District Court, briefs of the parties, and was argued by counsel.

After consideration, it is ordered and adjudged that the judgment of the said District Court in this cause be, and the same is hereby, reversed in accordance with the opinion of this Court.

September 16, 1983

A True Copy:

ATTEST: (illegible)

No. 83-1781

UNITED STATES COURT OF APPEALS
For The Eighth Circuit
September Term, 1982

EUGENE KASICK, et al,

Appellees,

vs.

JOHN R. BLOCK, etc., et al,

Appellants.

Appeal from the United States
District Court for the
District of Nebraska

On the Court's own motion it is now here ordered that the mandate in this appeal should issue forthwith without prejudice to appellee's right to petition for a rehearing under Federal Rules of Appellate Procedure 35, 40.

Mandate forthwith.

September 26, 1983

Order entered at the direction of the Court.

No. 83-1781-NE

UNITED STATES COURT OF APPEALS
For The Eighth Circuit
September Term 1983

EUGENE KASICK, et al,

Appellees,

vs.

JOHN R. BLOCK, Secretary of
the United States Department
Agriculture, et al,

Appellants.

Appeal from the United States
District Court for the
District of Nebraska

The Court, having considered appellees' petition for rehearing and suggestions for rehearing en banc and being now fully advised in the premises, hereby orders the petition for rehearing and suggestions for rehearing en banc denied.

October 27, 1983

DEPARTMENT OF AGRICULTURE

Agricultural Stabilization and
Conservation Service

7 CFR Part 770

SPECIAL PROGRAM OF PAYMENT IN KIND FOR ACREAGE DIVERSION FOR 1983 CROPS OF WHEAT, CORN, GRAIN SORGHUM, UPLAND COTTON AND RICE

AGENCY: Agricultural Stabilization and Conservation Service, USDA.

ACTION: Interim rule.

SUMMARY: This interim rule establishes a program of payment in kind for acreage diversion for the 1983 crops of wheat, corn, grain sorghum, rice and upland cotton. Under the program producers will be offered a quantity of a commodity as compensation for diverting acreage normally planted to that commodity in addition to that being taken out of production under the 1983 acreage reduction and cash land diversion programs for wheat, corn, grain sorghum, rice and upland cotton previously announced. Even with these programs the supply of these commodities will greatly exceed demand. Accordingly, the Department has determined that the diversion of additional acreage from the production of such crops is necessary to adjust the total national acreage of such commodities to desirable goals and that producers should be compensated by receipt of like commodities. This document sets forth, in general, the requirements for program participation and the manner in which payment in kind will be made available.

DATES: Effective date January 12, 1983. Comments must be submitted on or before February 11, 1983, in order to be assured of consideration.

ADDRESS. Comments should be addressed to Director, Analysis Division, ASCS, USDA, Room 3741, South Building, P.O. Box 2415, Washington, D.C. 20013.

FOR FURTHER INFORMATION CONTACT: Dr. Howard C. Williams, ASCS, 202-447-3391.

SUPPLEMENTARY INFORMATION: This interim rule has been reviewed under Department of Agriculture procedures implementing Executive Order 12291 and Secretary's Memorandum No. 1512-1 and has been classified as "major" since the program will have an annual effect on the economy exceeding $100 million.

It has been determined that the Regulatory Flexibility Act is not applicable to this interim rule since the Department is not required by 5 U.S.C. 553 or any other provision of law to publish a notice of proposed rulemaking with respect to the subject matter of this rule.

This action is not expected to have any significant impact on the quality of the human environment, health, and safety. Therefore, neither an Environmental Assessment nor an Environmental Impact Statement is needed.

The Department has prepared an Interim Regulatory Impact Analysis of this regulation. Copies of the analysis are available to the public from Director, Analysis Division, Agricultural Stabilization and Conservation Service, USDA, Room 3741, South Agriculture Building, 14th and Independence Avenue, SW., Washington, D.C. 20250.

The title and number of the federal assistance program to which this notice applies are: Cotton Production Stabilization, 10.052; Feed Grain Production Stabilization, 10.055; Rice Production Stabilization, 10.065; and Wheat Producton Stabilization, 10.058; as found in the Catalog of Federal Domestic Assistance.

STATUTORY AUTHORITY

The program will be conducted pursuant to the authority of the Agricultural Act of 1949, as amended, and the Commodity Credit Corporation Charter Act. The Agricultural Act of 1949, as amended by the Agriculture and Food Act of 1981, authorizes the Secretary to make land diversion payments to producers of wheat, feed grains, upland cotton and rice if the Secretary determines that the payments are necessary to assist in adjusting the total national acreage of the commodities to desirable goals. The Charter Act gives the Corporation broad authority to support the price of agricultural commodities, stabilize agricultural commodity markets and remove and dispose of agricultural surpluses.

NEED FOR PROGRAM

Acreage reduction and land diversion programs have already been instituted for the 1983 crops of wheat, feed grains, upland cotton and rice under provisions of the Agricultural Act of 1949, as amended. Producers participating in those programs will reduce planted acreage for wheat by at least 20%, for feed grains by at least 20%, for upland cotton by at least 20%, and for rice by at least 20%. Even with these programs the supply of these commodities will greatly exceed demand. Record production coupled with a weak worldwide demand for these com-

modities due to the global recession and severe financial problems of some of our major foreign customers has created undesirable surpluses. Accordingly, the Department has determined that the diversion of additional acreage from the production of such crops is necessary to adjust the total national acreage of such commodities to desirable goals and that producers should be compensated by receipt of like commodities.

PROGRAM PROVISIONS

Contracts. The Commodity Credit Corporation will enter into contracts with producers under which producers who divert acreage from the production of 1983 crops of wheat, corn, grain sorghum, upland cotton or rice and devote the acreage to approved conservation uses will be compensated in the form of quantities of those commodities. The acreage would be in addition to that which the producer has agreed to take out of production under the 1983 acreage reduction and cash land diversion programs previously announced.

Acreage Diversion. Any producer may enter into a contract to divert not less than 10 percent nor more than 30 percent of the farm acreage base for any crop. In addition, producers may submit bids for a contract to divert 100 percent of the farm acreage base for any crop. Bids must be in terms of the percentage of the farm's yield for the crop which the producers consider to be an acceptable level of compensation. The Department will determine the number of acres for which bids will be accepted for each commodity in each county based on particular supply/demand situations, conditions in local communities, and other relevant factors. In no event will more than 50

percent of the total acreage bases for a commodity in a county be taken out of production under this and the previously announced 1983 acreage reduction and cash land diversion programs.

Compensation. In the case of contracts for the diversion of between 10 and 30 percent of the acreage base of a commodity, the quantity of the commodity received as compensation will be the acreage diverted times the farm's yield for the commodity, multiplied by 95 percent for wheat, 80 percent for corn and grain sorghum, 80 percent for upland cotton, and 80 percent for rice. In the case of contracts for the diversion of 100 percent of the acreage base of a commodity, the quantity of the commodity received as compensation will be determined in the same way utilizing the percentage of the farm's yield specified in the bid.

To the extent that a producer has outstanding farmer owned reserve loans obtained before January 12, 1983 or regular price support loans for which the producer has pledged as security a commodity which the Department is obligated to pay the producer, the producer must sell the commodity to the Department up to the quantity the Department is obligated to pay the producer at a price equal to the cost of liquidating the loan for which the commodities sold to the Department are pledged. In the case of farmer owned reserve loans, the price will be reduced by the amount of any unearned advance storage payments. Further, in the case of farm stored farmer owned reserve loans, the price will include additional compensation to take account of long term storage related commitments the producer may have undertaken. It is the present intention of the Department to provide 15.5 cents per bushel

in additional compensation. The commodities sold to the Department will then be paid to the producer. To the extent that commodities are not available for purchase by the Department from the producer, the producer will receive commodities from warehouses designated by CCC. In all cases, proper adjustments for grade and other characteristics affecting quality will be made.

Other Contract Provisions. The regulations authorize the Department to include other appropriate terms and conditions in its contracts with producers.

The Department will pay commodities which it owes a producer upon request at any time during the five month period beginning on the normal harvest date for the commodity in the producer's area. These days will be established by the Department on a county-by-county basis. The Department presently intends to include in the contracts provisions under which it will pay producers who request the commodities after the normal harvest date, and are paid commodities previously pledged by them as loan security, the costs the Department would have incurred had it been required to store the commodities from the normal harvest date until the date of payment. The payment will be calculated on the basis of an annual rate of $.265 per bushel for wheat and corn, $.4732 per hundredweight for grain sorghum and $.85 per hundredweight for rice. The rate for upland cotton will be based on individual warehouse rate schedules.

The Department also intends to offer additional payment in kind to producers whose conservation use acreage requirement under the previously announced acreage reduction and cash land diversion programs has been reduced because of the payment limitation imposed by sec-

tion 1101 of the Agriculture and Food Act of 1981. These producers will have the opportunity to forego this reduction in conservation use acreage in return for a payment in kind based on 50 percent of the farm yield for the commodity to which the acreage is normally planted.

Payment Limitation. The limitations imposed by section 1101 of the Agriculture and Food Act of 1981 on the amount of payments which a person may receive under the wheat, feed grain, upland cotton and rice programs are not applicable to commodities received as compensation under the payment in kind program.

If the payment in kind program is to be effective in reducing production with respect to 1983 crops in order to assist in bringing supply in line with demand and stabilizing the domestic market, the program must be made effective as soon as possible without opportunity for public comment so that producers and others might be made aware of their opportunity to participate in the program. Comments received on the program will be considered and any appropriate changes in the program will be made before the final rule is issued. The Department anticipates issuing a final rule by February 25. Producers may sign contracts and submit bids for contracts until March 11, and previously submitted contracts and bids may be withdrawn until that date. If any change is made in the regulations, producers who have already signed contracts or submitted bids will have an opportunity to revoke them if they are unwilling to agree to the modifications.

The form of the contracts to be used by the Department in implementing this rule will not become effective until approved by the Office of Management and Budget under the Paperwork Reduction Act of 1980.

LIST OF SUBJECTS IN 7 CFR PART 770

Cotton, Feed grains, Price support program, Wheat, Rice.

Accordingly, Subchapter C of Chapter VII of Title 7 of the Code of Federal Regulations is amended by adding after Part 760 a new Part 770 as follows:

PART 770—SPECIAL PROGRAM OF PAYMENT IN KIND FOR ACREAGE DIVERSION FOR 1983 CROPS OF WHEAT, CORN, GRAIN SORGHUM, UPLAND COTTON AND RICE

Sec.

770.1 General description of program.

770.2 Obligations of operators and producers.

770.3 Obligations of the Department.

770.4 Other contract provisions.

770.5 Contracting procedures.

770.6 Miscellaneous provisions.

§ 770.1 General description of program.

(a) The Department of Agriculture will enter into contracts with operators and producers who agree to devote acreage normally planted to wheat, corn, grain sorghum, upland cotton or rice to a conserving use in return for compensation in the form of the commodity normally planted on the acreage. This part describes the general terms and conditions of these contracts and the procedures under which the Department will enter into them.

(b) This special program is available throughout the United States, including Puerto Rico, for the 1983

crops of wheat, corn, grain sorghum, upland cotton and rice.

§ 770.2 Obligations of operators and producers.

(a) The contract between the Department and the operator of a farm and any other producers on the farm will impose the following obligations on the operator and any other producers:

(1) The operator and any other producers will be required to comply with all of the requirements of any other acreage reduction or paid diversion program established by the Department for any commodity included in the contract.

(2) The operator and any other producers will be required to devote a percentage of the farm's acreage base for any commodity included in the contract to an approved conserving use in addition to any other acreage reduction or paid diversion. This percentage will depend on the contract between the Department and the operator and any other producers.

(i) The Department will enter into a contract with the operator of a farm and any other producers on the farm which provides for devoting from 10 to 30 percent of the farm's acreage base for one or more commodities to an approved conserving use, with a concomitant reduction in permitted acreage, if the operator and any other producers wish to do so. The operator and any other producers may select the commodities to be included in the contract, except that the contract must include either both corn and grain sorghum or neither. They may also select, within the 10 to 30 percent range, the percentage of the acreage base of each included commodity that will be de-

voted to an approved conserving use. Compensation to operators and other producers under these contracts will be based on a fixed percentage of the farm yield for each of the commodities included in the contract. See § 770.3 (a)(1).

(ii) In addition, the Department may, in some cases, enter into a contract with the operator of a farm and any other producers on the farm which requires the operator and any other producers to devote 100 percent of the farm's acreage base for one or more commodities to an approved conserving use. These contracts will be awarded on a competitive bid basis and the compensation to an operator and any other producers under one of these contracts will be based on the percentage of the established yield for the farm for each of the commodities included in the contract which was bid by the operator and any other producers. See § 770.5(b).

(3) If the operator of a farm or any other producers on the farm have outstanding farmer owned reserve loans obtained prior to January 12, 1983, or regular price support loans, for which they have pledged as security a commodity which the Department is obligated to pay them under the contract, at the time they request payment of the commodity, they must sell the commodity to the Department up to the quantity the Department is obligated to pay them, at a price equal to the cost of liquidating the loan or portion of the loan for which the quantity sold to the Department is pledged, subject to the following adjustments:

(i) In the case of a farmer owned reserve loan, the price will be reduced by the amount of any unearned advance storage payments received under the loan.

(ii) In the case of farm stored commodities pledged as security for a farmer owned reserve loan, additional compensation will be provided to take account of long term storage related commitments the operator or other producer may have undertaken.

(4) To the extent that the operator or any other producers have loans to which paragraph (a)(3) of this section applies at the time they enter into the contract, they may liquidate those loans or forfeit the commodity securing them only to the extent that the liquidation or forfeiture does not reduce the quantity of the commodity pledged as security for the loans still held by the operator and such other producers below the quantity of the commodity the Department is obligated to pay the operator and such other producers under the contract. The commodities pledged as security for loans that must be held under this paragraph will be used by the Department to compensate the operator and any other producers under the contract. See § 770.3(a)(2)(i).

§ 770.3 Obligations of the Department.

(a) The contract between the Department and the operator of a farm and any other producers on the farm will impose the following obligations on the Department:

(1) The Department will be required to compensate the operator and any other producers for devoting acreage to an approved conserving use by payment of a quantity of the commodity or commodities that would otherwise have been produced on that acreage, except that the Department may substitute corn of equivalent quantity for grain sorghum. The quantity shall be the yield for the farm for a commodity multiplied by the acreage devoted

to a conserving use under the contract that would otherwise have been planted to that commodity, multiplied by 95 percent for wheat, 80 percent for corn and grain sorghum, 80 percent for upland cotton, and 80 percment for rice, except that in the case of contracts awarded on a competitive bid basis, the percentage shall be the percentage bid by the operator and any other producers.

(2) The contract will provide that the commodities will be paid in the following manner:

(i) To the extent that the operator and any other producers have outstanding regular price support or farmer owned reserve loans for which they have pledged as security a commodity which they must sell to the Department, the commodities sold to the Department will be paid to the operator and such other producers. See § 770.2(a)(3).

(ii) To the extent that a commodity cannot be paid using the procedure described in paragraph (a)(2)(1) of this section, it shall be paid out of stocks available to the Department for that purpose.

(3) The contract will provide that the commodities will be paid upon request of the operator and any other producers at any time during the five month period beginning with normal harvest date for the commodity in the area where the farm is located.

(4) The contract may contain special arrangements and requirements with respect to the Department's obligations to producers who are active members of a marketing cooperative.

§ 770.4 Other contract provisions.

(a) The contract between the Department and the operator of a farm and any other producers on the farm will establish standards for the grade and other characteristics affecting the quality of any commodity the Department is obligated to pay to the operator and any other producers. It will further provide for adjustments in the quantity of a commodity paid to the operator and any other producers to compensate for any differences between these standards and the grade and other characteristics affecting the quality of the commodity paid to the operator and any other producers. For the purpose of determining these adjustments, a commodity paid under the procedure description in § 770.3(a)(2)(i) shall be treated as having the grade and other characteristics affecting its quality which it was treated as having at the time that the price support or farmer owned reserve loan for which it was pledged as security was made.

(b) The contract between the Department and the operator of a farm and any other producers on the farm shall contain such other provisions as the Department determines appropriate to carry out the program established by this part.

§ 770.5 Contracting procedures.

(a) An operator of a farm and any other producers on the farm may enter into a contract with the Department which provides for devoting 10 to 30 percent of the farm's acreage base for one or more commodities to an approved conserving use at the appropriate county ASCS office prior to the close of business on March 11, 1983.

(b) An operator of a farm and any other producers on the farm may submit a bid for a contract with the Department which provides for devoting 100 percent of the farm's acreage base for one or more commodities to an approved conserving use at the appropriate count ASCS office prior to the close of business on March 11, 1983.

(1) The operator and any other producers may select the commodities to be included in the bid, except that the bid must include either both corn and grain sorghum or neither.

(2) The bid shall state the percentage of the established yield for the farm for each of the commodities included in the bid to be used in determining the compensation to be paid to the operator and any other producers under the contract if the bid is accepted. The operator and any other producers may select any percentage, except that the percentage for a commodity cannot exceed 95 percent for wheat, 80 percent for corn and grain sorghum, 80 percent for upland cotton, or 80 percent for rice. The percentage may be different for different commodities, except that the percentage must be the same for corn and grain sorghum.

(c) After March 11 the bids in each county shall be ranked for each commodity, treating corn and grain sorghum as a single commodity, on the basis of the percentage of established yield to be used in determining compensation stated in the bids, with the lowest percentage being ranked highest. In the case of identical bids, they shall be ranked in the order received. The bids for each commodity shall then be accepted in rank order.

The Department will establish the number of acres for which bids will be accepted for each commodity ain each county, based on particular supply/demand situations, conditions in local communities, and other relevant factors. In no case will more than 50 percent of the total of the acreage bases for a commodity in a county be removed from production of the commodity under the program established by this part and any other acreage reduction or diversion program established under part 713 of this chapter. Acceptance of a bid under this subsection with respect to a commodity shall terminate any contractual obligations with respect to that commodity into under paragraph (a) of this section.

§ 770.8 Miscellaneous provisions.

(a) Payments in kind under the program established by this part shall not be considered payments for purposes of the payment limitations imposed by section 1101 of the Agriculture and Food Act of 1981.

(b) Part 713 of this chapter contains regulations which govern regular annual acreage reduction and diversion and other programs for wheat, feed grains, cotton and rice. Sections 713.60 through 713.74 of that part concerning land eligible for designation as conserving use acreage and the obligations of producers with respect to the use of that acreage shall apply to the program established by this part, except for the following:

(1) Summer fallow producers may designate only land that would normally be devoted to production of small grains or row crops in 1983.

(2) Wheat planted prior to January 11, 1983, may be grazed throughout the year and harvested for hay.

(c) In addition, the following provisions of this title concerning general program administration also apply to the program established by this part.

(1) Part 707—Payments Due Persons Who Have Died. Disappeared, or Have Been Declared Incompetent.

(2) Part 718—Determination of Acreage and Compliance.

(3) Part 780—Appeal Regulations.

(4) Part 790—Incomplete Performance Based Upon Action Or Advice of an Authorized Representative of the Secretary.

(5) Part 791—Authority to Make Payments When There Has Been a Failure to Comply Fully with the Program.

(6) Part 1403—Interest on Delinquent Debts.

(7) Section 110 of Part 713 concerning protection of tenants and sharecroppers.

Signed at Washington, D.C. on January 10, 1983.

John R. Block,
Secretary.

[FR Doc. 83-1022. Filed 1-11-83; 10:51 am]

BILLING CODE 3410-05-M

7 CFR Part 770

SPECIAL PROGRAM OF PAYMENT IN KIND FOR ACREAGE DIVERSION FOR 1983 CROPS OF WHEAT, CORN, GRAIN SORGHUM, UPLAND COTTON, AND RICE

AGENCY: Agricultural Stabilization and Conservation Service, USDA.

ACTION: Final rule.

SUMMARY: This final rule provides for a payment-in-kind program for acreage diversion for the 1983 crops of wheat, corn, grain sorghum, rice and upland cotton. Under the program, producers will be offered a quantity of a commodity as compensation for diverting acreage normally planted to that commodity in addition to that being taken out of production under the 1983 acreage reduction and cash land diversion programs for wheat, corn, grain sorghum, rice and upland cotton previously announced. The Department has determined that the diversion of this additional acreage from the production of such crops is necessary to adjust the total national acreage of such commodities to achieve desirable production goals and that producers should be compensated by receipt of like commodities. This final rule amends an interim rule which was published with respect to a payment-in-kind program on January 12, 1983 (48 FR 1476), setting forth the requirements for program participation and the manner in which payment in kind will be made available.

EFFECTIVE DATE: March 4, 1983.

FOR FURTHER INFORMATION CONTACT:

Grant B. Buntrock, ASCS, 202-447-7641.

This final rule has been reviewed under Department of Agriculture procedures implementing Executive Order 12291 and Secretary's Memorandum No. 15121 and has been classified as "major" since the program will have an annual effect on the economy exceeding $100 million.

It has been determined that the Regulatory Flexibility Act is not applicable to this final rule since the Department is not required by 5 U.S.C. 553 or any other provision of law to publish a notice of proposed rulemaking with respect to the subject matter of this rule.

An Environmental Evaluation with respect to the payment-in-kind program has been completed. It has been determined that this action is not expected to have any significant impact on the quality of the human environment. In addition, it has been determined this action will not adversely affect environmental factors such as wildlife habitat, water quality, air quality, and land use and appearance. Accordingly, neither an Environmental Assessment nor an Environmental Impact Statement is needed.

The Department has prepared a Final Regulatory Impact Analysis of this regulation. Copies of the analysis are available to the public from Director. Analysis Division, Agricultural Stabilization and Conservation Service, USDA, Room 3741, South Agriculture Building, 14th and Independence Avenue, SW., Washington, D.C. 20250.

The title and number of the federal assistance programs to which this rule applies are: Cotton Production Stabilization, 10.052; Feed Grain Production Stabilization, 10.055; Rice Production Stabilization, 10.065; and Wheat Production Stabilization, 10.058; as found in the Catalog of Federal Domestic Assistance.

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sion of law to publish a notice of proposed rulemaking with respect to the subject matter of this rule.

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The Department is preparing a Final Regulatory Impact Analysis of this regulation. Copies of the analysis will be available to the public after signup, including processing of whole base bids, has been completed and data has been finalized. Copies can be obtained from Director, Analysis Division, Agricultural Stabilization and Conservation Service, USDA, Room 3741, South Agriculture Building, 14th and Independence Avenue, SW., Washington, D.C. 20250.

The title and number of the federal assistance programs to which this rule applies are: Cotton Production Stabilization, 10.052; Feed Grain Production Stabilization, 10.055; Rice Production Stabilization, 10.065; and Wheat Production Stabilization, 10.058; as found in the Catalog of Federal Domestic Assistance.

PROGRAM AUTHORIZATION

The Agricultural Act of 1949, as amended by the Agriculture and Food Act of 1981, authorizes the Secretary

to make land diversion payments to producers of wheat, feed grains, upland cotton, and rice if the Secretary determines that the payments are necessary to assist in adjusting the total national acreage of the commodities to desirable goals. The Commodity Credit Corporation Charter Act gives the Corporation broad authority to support the price of agricultural commodities, stabilize agricultural commodity markets, and remove and dispose of agricultural surpluses. In accordance with these authorities, an interim rule was published in the Federal Register on January 12, 1983, providing for a payment-in-kind program for acreage diversion for the 1983 crops of wheat, corn, grain sorghum, upland cotton, and rice. The interim rule invited public comments on the provisions of the program by February 11, 1983.

DISCUSSION OF COMMENTS

The Department received 498 comments from 335 farmers, 46 farm input suppliers, 53 private citizens, 15 farm organizations, 15 commodity associations, 7 government (local/state/national) officials or organizations, 4 conservation organizations and 23 miscellaneous respondents.

Over 65 percent of the comments received were concerned with one or more of the following issues:

(a) *Inclusion of barley and/or oats in the program.* Barley and oats are not included in the 1983 payment-in-kind program. The primary reason for their exclusion is that the proportions of ending stocks to use are not as severely out of line with historical levels as is the situation with the other commodities. Moreover, the announced acreage reduction and cash land diversion program for

oats and barley is expected to assist in reducing stocks to more reasonable levels. This adjustment along with that for other grains will improve price prospects for barley and oats.

(b) *Allow summer fallow producers to grow non-program crops on diverted acres under the payment-in-kind program or designate fallow acres under the program.* Permitting producers to designate land which is fallowed in 1983 as conservation use acreage for 1983 means that other commodities could be grown on the land which was fallowed in a previous year. These commodities could include other program commodities, if the producers were not participating in the acreage reduction and cash land diversion program for the commodity. If the production of certain commodities on designated conservation use acreage were permitted, other acreage would then be available to produce program commodities. This would impair the effectiveness of the payment-in-kind program in achieving the goal of reducing overall production.

(c) *Provide for making payments in kind available early, mainly for feed or to clear storage space.* Payments in kind are intended to compensate producers who have reduced their acreages which would have otherwise been planted to the 1983 crops of wheat, corn, grain sorghum, upland cotton, or rice. Accordingly, quantities of these commodities which are made available as payment-in-kind are considered to be 1983 production. Therefore, payments in kind are scheduled to be available beginning with the normal harvest date for the 1983 crops of these commodities in each area. Earlier release of these commodi-

ties could distort the usual seasonal price patterns for both old crop and new crop commodities.

(d) *Decrease the maximum acreage to be diverted under the payment-in-kind program and the acreage reduction and cash land diversion programs from 50 percent to between 30 and 35 percent.* The overall majority of farm input suppliers commenting on the payment-in-kind program suggested a reduction in the percentage of the total acres which are permitted to be diverted under the payment-in-kind program and the acreage reduction and cash land diversion program. The 50 percent limitation on program crop acreage is determined based upon the total of the farm acreage bases which are established for the commodity in the county and not on the total acreage which was planted to that commodity in the county in 1982. The unlikely occurrence of 100 percent participation in both the acreage reduction and cash land diversion program and at the maximum level in the 10 to 30 percent of the base payment-in-kind program would be necessary in order to achieve a 50 percent diversion of each program crop base. Currently, it is estimated that participation in the payment-in-kind program will range between 80 to 90 percent. It is likely that less than 15 percent of total cropland will be withdrawn from production under both programs.

(e) *Eliminate the farm program yield and/or use the county average to determine the quantity of payments in kind.* The regulations governing the commodity programs which are found at 7 CFR Part 713 require the use of program yields. Producers who are dissatisfied with their established yields for wheat, corn, and grain sorghum

are given the opportunity to prove their actual yields. Further, it would be inequitable to producers who have yields above the county average to use individual yields to achieve a weighted county average and to assign each person a yield which is identical to that county average yield.

(f) *Convert a portion of the payment-in-kind acres into permanent conservation use acres.* The payment-in-kind program is a one-year program although it may be extended an additional year to meet program objectives. Under the annual commodity programs announced by the Department, producers are encouraged to implement permanent conservation practices. Such producers receive assurances that the acreage on which permanent conservation practices are installed and maintained can be used to meet program requirements for each crop year through 1985 if a conservation use acreage requirement is in effect.

(g) *Include popcorn in the acreage reduction and cash land diversion program and the payment-in-kind program.* A resolution by the Nebraska Popcorn Growers with a statement of support signed by 77 producers requested that popcorn be treated as corn for program purposes. Popcorn has not historically been considered to be corn for the purposes of the feed grain program. Acreage which is devoted to popcorn is not, and never has been, used in determining the acreage base for a farm under the feed grain program. Consequently, it has been determined that this acreage is not eligible for payments in kind nor is the acreage of popcorn charged against the acreage of corn which is permitted to be grown by a producer on the farm under the payment-in-kind program.

Other comments concerned tenant rights, warehouse locations, the quality of the grain to be received as payment in kind, the abolition of the payment limitation, distribution of program benefits, the effects on related industries, and the general administration of the program.

Those commenting also requested the addition of other crops under the payment-in-kind program, deficiency payments on grain which is made available as payment-in-kind, and adjustments in disposal deadlines. In particular, private citizens were concerned about feeding starving people with surplus stocks, conservation opportunities under the program, and the need for and cost of farm programs in general.

These comments and all others received were considered in developing the final rule.

Amendments to the Interim Rule

It has been determined after further review that certain technical revisions and clarifications should be made with respect to the provisions of the interim rule which were published at 7 CFR Part 770. It is not believed that these changes are of such significance that further public comment would be warranted. Further, it is imperative that a final rule be published as soon as possible so that the terms and conditions of the payment-in-kind program can be finalized and producers can make a reasoned judgment as to whether they should participate in the program for the 1983 crops. The following is an explanation of the changes which have been made to the interim rule:

(a) Section 770.2(a)(3) of the interim rule provides that a producer who is participating in the payment-in-

kind program and who has an outstanding CCC price support loan will be required to redeem a quantity of the commodity which is pledged as collateral for such loan which equals the quantity of the commodity which the producer is otherwise entitled to receive from the Department as payment in kind and sell such quantity to the Department. The Department will purchase the commodity from the producer at a price which equals the cost which the producer incurs in liquidating the loan; i.e., principal, interest, liquidated damages, and other applicable charges. In some instances, it may be to the advantage of the producer, the Department, or both to make different arrangements with respect to the liquidation of a quantity of the commodity pledged as collateral for a loan and the purchase of such quantity by the Department. Accordingly, this section has been revised to permit different arrangements to be mutually agreed upon and specified in the contract between the producer and the Department.

(b) Section 770.3(a)(1) of the interim rule has been amended to clarify that if the entire acreage base for a commodity on the farm has been accepted for payment-in-kind purposes, payment in kind will not be made with respect to that portion of the farm acreage base which is otherwise eligible for cash land diversion payments. Since the Omnibus Budget Reconciliation Act of 1982 provides that cash land diversion payments shall be made for a specific percentage of the farm acreage base on participating farms for the 1983 crops of wheat, feed grains, and rice, any payments in kind which are made with respect to the same acreage would represent double compensation.

(c) In some instances, county ASCS offices have found it beneficial to establish an appointment schedule for enrollment, during the course of which producers have the opportunity to submit a whole base bid for a commodity on a farm under the payment-in-kind program. In such cases, it would be unfair to break ties between identical bids according to the time the bid was received. Accordingly, § 770.5(c) of the interim rule has been revised to provide that if identical whole base bids have been submitted to the county ASCS office where an appointment procedure has been utilized, a lottery shall be used to determine the priority by which such bids should be ranked.

(d) The interim rule did not provide for a succession in interest to payments in kind, except when a producer dies, disappears, or is declared to be incompetent. Accordingly, a new paragraph (d) has been added to § 770.6 to provide for the succession of interest to payments in kind in other situations.

(e) The interim rule did not provide for assignments of payments in kind. It has been determined that the Department will honor an assignment of a payment in kind, without regard to the purposes of such assignment, if the producer (as assignor) and assignee agree to such assignment and execute the appropriate form. Therefore, a new paragraph (e) has been added to § 770.6 to authorize the making of such assignments for payment-in-kind purposes.

(f) The interim rule did not specify that payments in kind will be made without regard to claims or liens. A similar provision is applicable to other program benefits which are made available to producers under commodity programs. Thus, a new paragraph (f) has been added to

§ 770.6 setting forth this provision with respect to payments in kind.

Information collection requirements contained in this regulation (§§ 770.1 through 770.6) have been approved by OMB under the provisions of 44 U.S.C. Chapter 35 and have been assigned OMB Number 0580-0092.

List of Subjects in 7 CFR Part 770

Cotton, Feed grains, Price support program, Wheat, Rice.

Final Rule

PART 770—(AMENDED)

Accordingly, the interim rule published at 48 FR 1476 is hereby adopted as a final rule, with the following changes:

1. Section 770.2 is amended by revising the introductory text of paragraph (a)(3) to read as follows:

§ 770.2 Obligations of operators and producers.

(a) • • •

(3) If the operator of a farm or any other producers on the farm have outstanding farmer owned reserve loans obtained prior to January 12, 1983, or regular price support loans, for which they have pledged as security a commodity which the Department is obligated to pay them under the contract, at the time they request payment of the commodity, they must, unless otherwise agreed upon between the producer and the Department and provided for in the contract, sell to the Department a quantity of the commodity which equals the quantity of such commodity

which the Department is obligated to pay them, at a price which is equal to the cost of liquidating the loan or portion of the loan for which the quantity sold to the Department is pledged, subject to the following adjustments:

• • •

2. Section 770.3 is amended by revising the second sentence of paragraph (a)(1) to read as follows:

§ 770.3 Obligations of the Department.

(a) • • •

(1)• • • The quantity shall be the yield for the farm for a commodity multiplied by the acreage devoted to a conserving use under the contract that would otherwise have been planted to that commodity, less the acreage on the farm which is eligible for cash land diversion payments, multiplied by 95 percent for wheat and 80 percent for corn, grain sorghum, upland cotton, and rice, except that in the case of contracts awarded on a competitive bid basis, the percentage shall be the percentage bid by the operator and any other producers.

3. Section 770.5 is amended by revising the second sentence in paragraph (c) to read as follows:

§ 770.5 Contracting procedures.

• • •

(c) • • • In the case of identical bids, they shall be ranked in the order received or, where an appointment procedure was utilized by the county ASCS office during the course of which producers submitted bids, a lottery

shall be conducted to determine the order by which such bids should be ranked. * * *

4. Section 770.8 is amended by adding new paragraphs (d), (e), and (f) to read as follows:

§ 770.6 Miscellaneous provisions.

* * *

(d) When any person who had an interest as a producer in the commodity or would have had an interest in the commodity as a producer if the commodity had been planted (herein called "predecessor") is succeeded on the farm by another producer (herein called "successor") after a contract has been executed, any payment in kind which is due and owing shall be divided between the predecessor and successor on such basis as the predecessor, successor, and the Department agree is fair and equitable, the contract shall be revised accordingly, and the successor shall sign the revised contract.

(e) Assignments with respect to quantities of a commodity which can be received by a producer as payment in kind will be recognized by the Department only if such assignment is made on Form CCC-479, Assignment of Payment-In-Kind, executed by the assignor and assignee, and filed with the county committee.

(f) Except as provided in paragraph (e) of this section, any payment in kind or portion thereof which is due any person shall be made without regard to questions of title under State law, and without regard to any claim of lien against the commodity, or proceeds thereof, which may be asserted by any creditor.

Signed at Washington, D.C., on February 28, 1983.

John R. Block,

Secretary.

[FR Doc. 83-5729 Filed 3-3-83; 8:05 a.m.]

Billing Code 3410-05-M

UNITED STATES STANDARDS FOR CORN

§ 26.351 Terms defined

For the purposes of the United States Standards for Corn (Maize):

(a) Corn. Corn shall be any grain which consists of 50 percent or more of whole kernals of shelled dent corn and/or shelled flint corn (Zea mays) and may contain not more than 10.0 percent of other grains for which standards have been established under the United States Grain Standards Act.